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No. 98-2059

In The

Supreme Court of The United States

October Term 1997

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MINNEAPOLIS BRANCH, ET AL,

Petitioners,

v.

METROPOLITAN COUNCIL, A PUBLIC BODY CORPORATE AND POLITIC,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 97-2059
October Term, 1997

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Minneapolis Branch on behalf of themselves and all others similarly situated; BRYSTON HILL, by his next friend Lisa Hill; SOPHIE KRAHNKE, by her next friends Steven Krahnke and Jane McLeod; MIQUEL MCELROY, by his next friend Annie Pearl McElroy; GREGORY MCFARLAND, by his next friend Linda McFarland; SOLVEIG MEBUST and ANNA MEBUST, by their next friends Bruce Lynn Mebust and Kirsten Ann Scribner Mebust; DIAMOND PORTER, by his next friend Jamie Porter,

Petitioners,

v.

METROPOLITAN COUNCIL, a Public Body Corporate and Politic,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Petitioners, Minneapolis Branch of the National Association for the Advancement of Colored People ("NAACP") and six Minneapolis school children, through their parents, bringing this action on behalf of a class of children enrolled, or expected to be enrolled during the pendency of the lawsuit, in the Minneapolis public schools, submit this reply to the brief in opposition of respondent.

The brief in opposition of respondent fails to address satisfactorily the irreconcilable conflict between the Eighth Circuit's decision and this Court's decision in *Rivet v. Regions Bank of Lousiana*, 118 S. Ct. 921 (1988) ("*Rivet*"), holding that the removal of a state action cannot be based on a prior federal judgment. Also, the brief in opposition distorts the opinions of other circuits, which demonstrate the existence of a circuit split on this issue. Further, the brief in opposition does not adequately address petitioners' argument regarding the impermissible delegation of judicial authority to a private party.

I. THE EIGHTH CIRCUIT'S DECISION CONTRAVENES THE LIMITS TO FEDERAL JURISDICTION SET FORTH IN THIS COURT'S RECENT RULING IN *RIVET*.

In *Rivet*, this Court reaffirmed that in finding jurisdiction of removed cases, federal courts are limited to the content of a plaintiff's complaint and nothing more. In other words, *Rivet* merely clarified the traditional rule that a case may not be removed on the basis of a defense.

Respondent is attempting to evade this fundamental rule of federal jurisdiction by recharacterizing the Eighth Circuit's justifications for upholding removal of this case. Respondent is now asking this Court to accept that the Eighth Circuit upheld removal not because respondent raised the defense of claim preclusion, but rather because "removal was proper under the All Writs Act to protect the integrity of . . . [a] federal consent decree." Brief in Opposition, p. 7.

Respondent is making a distinction without a difference. First, it was respondent, not the court, who initiated the removal of this action by asserting that "plaintiffs state court action might frustrate the implementation of the Hollman Consent Decree." (Appendix to Petition ("Apdx.") C, pp. 56-57). Such an assertion in a removal action by a defendant is nothing more than raising a defense of claim preclusion, regardless of how that defendant later tries to characterize the assertion. When respondent in this case raised the contention that petitioners' claims might

interfere with a prior federal consent decree, and then used that argument to remove this action, respondent did what *Rivet* specifically prohibits—using a defense of claim preclusion to remove a state action.

Further, respondent mistakenly argues that removal was appropriate because the prior federal action in question is a consent decree. Claim preclusion defenses apply to all types of prior judgments. Whether that judgment is a prior consent decree or an adjudication is irrelevant.

Respondent is asking this Court to approve what is simply an alternative means of using a federal defense of claim preclusion to justify removal through the All Writs Act. Under the Eighth Circuit's decision, any defendant with a claim preclusion defense could raise the All Writs Act to circumvent *Rivet*. The justifications cited by the Eighth Circuit for removal of a state action under the All Writs Act because of a prior federal judgment are justifications in every claim preclusion case. For instance, the Eighth Circuit justified upholding the district court's removal under the All Writs Act because "the district court was confronted with a situation where [plaintiffs] were resorting to a state forum to relitigate settled and released claims." *NAACP v. Metropolitan Council*, 125 F.3d 1171, 1173 (8th Cir. 1997) ("NAACP I") (Apdx. C, p. 18). The "situation" that justified the Eighth Circuit's ruling, that is, that removal was necessary in order to prevent plaintiffs from relitigating matters already settled in federal court, is the core of all claim preclusion cases. *See Federated Dep't Stores, Inc. v. Moitie*, 101 S.C.

2424, 2428 (1981) (explaining that claim preclusion prevents parties from "relitigating settled claims"). The Eighth Circuit also stated that "the district court was warranted in authorizing removal from state court under the All Writs Act to protect the integrity of the federal consent decree entered in *Hollman*." *NAACP I*, 125 F.3d at 1173 (Apdx. C, p. 18). Again, the rationale used by the Eighth Circuit is a justification that is always present in claim preclusion cases. *See Allen v. McCurry*, 101 S. Ct. 411, 415 (1980) (stating that claim preclusion serves to "prevent[] inconsistent decisions").

II. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS ON THE ISSUE PRESENTED BY THIS PETITION.

Contrary to respondent's claims, decisions from other circuits conflict directly with the Eighth Circuit's ruling in this case. For example, in *Hillman v. Webley*, the Tenth Circuit ruled that removal was improper where the district court had relied on the All Writs Act to assume jurisdiction over the action. 115 F.3d 1461, 1469 (10th Cir. 1997) ("*Hillman*"). In *Hillman*, similar to the circumstances of this case, the district court had "retain[ed] continuing jurisdiction over implementation of the settlement, as well as continuing jurisdiction over the parties to the action." *Id.* at 1464. In ruling that the All Writs Act could not be used to justify removal, the Tenth Circuit specifically considered that the district court, as argued by respondent in this case, "was simply attempting to guard the integrity of its prior rulings in the multidistrict litigation." *Id.* at 1469. In so holding, the Tenth Circuit discussed and specifically rejected the *VMS Securities* and *Agent Orange* decisions upon which the Eighth Circuit relies. *Id.* Instead, consistent with *Rivet*, the Tenth Circuit suggested use of the Anti-Injunction Act to enjoin plaintiffs from pursuing claims in state court. *Id.*

In addition, the Ninth Circuit, in *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, found that because the district court did not have jurisdiction over the underlying claim, the court could not remove it to federal court under the

All Writs Act. 922 F.2d 932, 937 (9th Cir. 1993). In so holding, the Ninth Circuit reaffirmed the essence of *Rivet*—in determining removal, courts are limited to the face of a plaintiff's complaint. In *Westinghouse*, the court held that because the complaint did not allege a federal issue, the federal court did not have jurisdiction. *Id.*

Respondent's contention that there is no conflict among the circuits on this issue is even at odds with the Eighth Circuit. Both Eighth Circuit decisions in this case acknowledge the circuit split. *See NAACP I*, 125 F.3d at 1174 (Apdx. C, p. 19); *NAACP v. Metropolitan Council*, 144 F.3d 1168, 1171 (8th Cir. 1998) ("*NAACP II*") (Apdx. A, p. 8).

III. RESPONDENT FAILED ADEQUATELY TO ADDRESS PETITIONERS' ARGUMENT THAT THE EIGHTH CIRCUIT DELEGATED A POWER RESERVED EXCLUSIVELY FOR THE JUDICIARY TO A PRIVATE PARTY.

Respondent's statement that petitioners' claim that the court has improperly delegated judicial authority is merely a "make-weight argument" is absurd. Brief in Opposition, p. 15. Respondent has failed to answer petitioners' charge. In this case, it was the respondent, not the district court, who used the All Writs Act to effectuate removal. The district court issued no writ. Rather, the Eighth Circuit held that the district court's denial of petitioners' motion to remand "was proper under the All Writs Act." *NAACP I*, 125 F.3d at 1174 (Apdx. C, p. 19.)

Although using the justification of the All Writs Act to retain this case in federal court, the district court never issued a writ or otherwise ordered removal in order to bring this case into federal court. *Compare Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 858 (2d Cir. 1988) (upholding district judge's order to City of Yonkers to remove the state proceedings to federal court). Instead, the district court merely affirmed the removal by respondent, a private litigant. In so doing, the court unjustifiably delegated and transferred its judicial power under the Act to a private party in this lawsuit. The Eighth Circuit's decision affirming the district court has created a dangerous precedent investing

private litigants with powers reserved to the judiciary under the All Writs Act.

CONCLUSION

Accordingly, for all of the foregoing reasons and those stated in their petition, petitioners respectfully request that this Court grant their petition for writ of certiorari.

Dated: September 2, 1998.

Respectfully submitted,

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